

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

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In re:	)	1986 OAL Determination No. 10
Request for Regulatory	)	
Determination filed by	)	[Docket No. 86-006]
California Association	)	OF CALIFORNIA
of Rehabilitation	)	November 26, 1986
Facilities concerning	)	
the Department of	)	Determination Pursuant to
Developmental Services'	)	Government Code Section
Vendorization Procedure	)	11347.5; Title 1, California
Manual/ <u>1</u>	)	Administrative Code, Chapter
	)	1, Article 2

Determination by: LINDA HURDLE STOCKDALE BREWER, Director

Herbert F. Bolz, Coordinating Attorney  
Rulemaking and Regulatory  
Determinations Division

THE ISSUE PRESENTED/2

The California Association of Rehabilitation Facilities (Cal-ARF) has requested the Office of Administrative Law (OAL) to determine whether or not the Department of Developmental Services' (DDS or Department) Vendorization Procedure Manual (VPM), is a regulation as defined in Government Code section 11342(b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA)./3

THE DECISION/4, 5, 6

The Office of Administrative Law finds that the above noted Manual (1) is subject to the requirements of the APA, (2) is a regulation as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA./7, 8

November 26, 1986

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

In July 1978, as part of an Executive Branch reorganization, the California State Department of Health was divided into ten departments. The Department of Developmental Services is one of those ten departments.

The California Supreme Court/<sup>9</sup> has described DDS' responsibilities as follows:

"Broadly, DDS, a state agency, 'has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons' ([Welfare and Institutions Code section] 4416) . . . . [Par.] . . . DDS has the authority to promote uniformity and cost-effectiveness in the operations of the regional centers. . . ."

Regional centers are private nonprofit community agencies utilized by the state for the purpose of providing services to developmentally disabled persons./<sup>10</sup> Regional centers "are charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime'. . . ."/<sup>11</sup>

The funding for services for the developmentally disabled is funneled by DDS through the 21 regional centers in California to the providers or "vendors" of the services, e.g., skilled nursing facilities and physical therapists.

Authority

The Department's general rulemaking power is established by Welfare and Institutions Code section 4405 and Government Code section 11152. Welfare and Institutions Code section 4405 provides in part that

"the Director of Developmental Services [ ] shall have the powers of a head of a department pursuant to Chapter 2 (commencing with Section 11150) of Part 1 of Division 3 of Title 2 of the Government Code . . . ."

Government Code section 11152 states in part:

". . . So far as consistent with law the head of each department may adopt such rules and regulations as are

November 26, 1986

necessary to govern the activities of the department  
. . . ." [Emphasis added.]/12

For purposes of this Determination, Welfare and Institutions Code section 4691 provides DDS with specific rulemaking authority as it applies to community-based day programs for developmentally disabled persons./13 Section 4691(b) states in part:

"For the purpose of ensuring that regional centers may secure high quality services for persons with developmental disabilities, [DDS] shall adopt regulations establishing standards . . . ." [Emphasis added.]/14

#### Applicability of the APA to Department's Quasi-Legislative Enactments

Government Code section 11152 provides in part:

"So far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department . . . ." [Emphasis added.]

We read the phrase "So far as consistent with law" to mean (among other things) that regulations adopted under this section must be adopted in conformity with the law governing administrative regulations -- the APA. Therefore, DDS quasi-legislative enactments are subject to APA requirements.

In any event, the APA applies by its terms to all state agencies, except those "in the judicial or legislative department."/15 Since DDS is in neither the judicial nor the legislative "department," there can be no doubt that APA rulemaking requirements generally apply to DDS./16

#### Background

The following undisputed facts and circumstances have given rise to the present Determination.

The Legislature has concluded that the lack of clear standards has brought into question the quality of services provided to the developmentally disabled. Welfare and Institutions Code section 4541(a) provides:

"The Legislature finds and declares that assurance of high quality services to persons with developmental

November 26, 1986

disabilities is adversely affected by the lack of clear standards, the lack of a method for setting rates of reimbursement based upon those standards, and the lack of effective enforcement of these standards." [Emphasis added.]

In Welfare and Institutions Code section 4541(c), the Legislature mandated preparation of a detailed plan by September 1, 1983,

" . . . to implement standards for quality assurance, rates based upon the standards, a method to enforce the standards, and processes for the vendorization or accreditation of service providers." [Emphasis added.]

In 1984, the Legislature amended Welfare and Institutions Code section 4691 to read:

(a) the Legislature reaffirms its intent that community-based day programs be planned and provided . . . [and] that standards be developed to ensure high quality services. . . .

(b) For the purpose of ensuring that regional centers may secure high quality services for persons with developmental disability, the State Department of Developmental Services shall adopt regulations establishing standards. . . ." [Emphasis added.]

A 222-page document titled the Vendorization Procedure Manual, also known as the Vendorization Manual, was issued by DDS last year. This Vendorization Procedure Manual, dated July 1985, describes its purpose as to

" . . . provide [ ] step-by-step instructions whereby regional centers are able to complete the documentation necessary for billing and quality assurance of each provider of care."/17

The VPM defines "vendorization" as

"the process which provides the mechanism for regional centers and the State Department of Developmental Services to certify that potential providers of service to regional center clients meet the minimum standards established by the Department . . . . Becoming a vendorized service provider means that the vendor is eligible

November 26, 1986

to provide the vendored service(s) for regional center clients. . . ." [Emphasis added.]/18

Cal-ARF, the requestor, defines itself as

"a nonprofit trade association whose members are providers of services who represent 80% of the work activity programs and 60% of the day training and activity centers . . . for the developmentally disabled of California. Cal-ARF serves approximately 13,000 developmentally disabled clients on a daily basis. . . ."/19

Responding to the above Vendorization Procedure Manual (the challenged rule in this case), Cal-ARF filed a Request for Determination with OAL on April 21, 1986.

On October 28, 1986, the Department filed with OAL a notice of proposed rulemaking concerning, inter alia, activity center "vendorization" standards. This notice, published in the November 7, 1986, Notice Register, heralded draft regulations addressing many of the points appearing in the VPM.

## II. DISCUSSION OF DISPOSITIVE ISSUES

There are three main issues before us:/20, 21

- (1) WHETHER THE ISSUANCE OF THE CHALLENGED RULE CONSTITUTES AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE DEPARTMENT.
- (2) WHETHER THE CHALLENGED RULE IS A REGULATION WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE REFLECTS THE EXERCISE OF THE DEPARTMENT'S QUASI-LEGISLATIVE POWERS./22

The term "quasi-legislative" is not defined in the APA. In determining whether a rule reflects the exercise of quasi-legislative power, we look to the judicial definition of "quasi-legislative."/23

According to the California Supreme Court, a quasi-legislative rule is one formulating a general policy oriented

November 26, 1986

toward future decisions, rather than the application of a rule to the peculiar facts of an individual case./24

According to the Vendorization Manual,

"Becoming a vendored service provider means that the vendor is eligible to provide the vendored service(s) for regional center clients. . . . Once vendored, the provider is included in the statewide vendor panel listing and any regional center may authorize purchase of service from the vendored provider." [Emphasis added.]/25

The VPM consists of a series of general criteria oriented toward future decisions as to which applicants shall be deemed eligible to provide services to the developmentally disabled.

The Vendorization Procedure Manual clearly meets the judicial definition of "quasi-legislative." Therefore, we conclude that the Manual reflects the exercise of DDS' quasi-legislative powers.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(b) defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, . . . instruction [or] . . . standard of general application which is a regulation as defined in subdivision (b) of section 11342, unless the

November 26, 1986

guideline, criterion, . . . instruction [or] . . .  
standard of general application . . . has been  
adopted as a regulation and filed with the  
Secretary of State pursuant to this chapter. . . ."  
[Emphasis added.]

Applying the definition found in Government Code section  
11342(b) involves a two-part inquiry.

First, is the informal rule either

- ° a rule or standard of general application or
- ° a modification or supplement to such a rule?

Second, does the informal rule either

- ° implement, interpret, or make specific the law  
enforced or administered by the Department or
- ° govern the Department's procedure?

The answer to both parts of this inquiry is "yes."

For purposes of analysis, we will focus on one particular  
provision of the Vendorization Procedure Manual, section 120  
"General Vendor Standards," as one example of the numerous  
regulatory provisions in the Manual. Other regulatory provi-  
sions are discussed in note 8.

Section 120 "General Vendor Standards" provides in part:

"All vendors from whom services may be purchased by  
regional centers shall:

1. Meet the minimum standards established by the  
Department for his/her classification or program."  
[Emphasis added.]

The above-noted "minimum standards" apparently are contained  
in Exhibit III to the VPM (p. III-2). A typical "standard"  
for activity centers is as follows:

". . . an activity center shall . . . meet all of the  
following criteria:

. . . . .

4. A written, planned schedule of social and other purposeful independent or group activities is required for each client."

First, the written schedule requirement is clearly a standard of general application. It applies on a statewide basis to all activity centers which seek authorization to serve developmentally disabled clients.

Second, the written schedule requirement implements the law enforced and administered by DDS. Under the Lanterman Developmental Disabilities Services Act of 1978/26, DDS is responsible for the "care, custody, and treatment of developmentally disabled persons."/27 This Act mandates that DDS develop standards "to ensure high quality services."/28

"Vendorization" criteria constitute one critical form of standards designed to ensure high quality services. The written schedule requirement has been labelled by DDS in the VPM as a "standard." We concur in this characterization: the written schedule requirement is clearly a "standard" created to implement Welfare and Institutions Code section 4691.

We conclude that the written schedule requirement is a "regulation" within the meaning of the key provision of Government Code section 11342.

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA./29 We conclude that none of the recognized exceptions (set out in note 29) apply to the Vendorization Procedure Manual.




November 26, 1986

### III. CONCLUSION

For the reasons set forth above, OAL finds that the DDS Vendorization Procedure Manual (1) is subject to the requirements of the APA, (2) is a regulation as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

DATE: November 26, 1986

  
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HFB:dlw/101:D1-7

## NOTES

1. In this proceeding, the California Association of Rehabilitation Facilities was represented by David Rosenberg, Esq. of Diepenbrock, Wulff, Plant & Hannegan, 300 Capitol Mall, 17th Floor, Sacramento, CA 95814. The Department of Developmental Services was represented by Harriet Hopgood.
2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum narrowly interpreting ambiguous statute). For a recent example of a case involving compliance with the APA, see Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n. 5 (avoiding issue of whether DDS directive was an underground regulation).
3. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code. Sections 11340 through 11356, Chapters 4 and 5, also part of the APA, concern administrative adjudication rather than rulemaking.
4. As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall be published

in the California Administrative Notice Register and be made available to . . . the courts." (Emphasis added.)  
Implementing this directive, this and other determinations are presently being mailed to the presiding judges of all state and federal courts in California.

5. Two timely comments were received and considered. One comment was received from Judy McDonald, Cal-ARF Advocate; one from Barrie L. Dyer, Executive Director of Work Training Center for the Handicapped, Inc. Both supported the Request for Determination.
6. In this case, the Department elected not to submit a response to the Request for Determination. In general, we encourage affected agencies to submit responses in order to obtain full presentation of contrasting viewpoints. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.
7. We read the requestor's Prayer in the Request for Determination as asking that the Rate Procedure Manual (1) be found a "regulation" and (2) subject to the requirements of the APA and therefore invalid and unenforceable unless adopted pursuant to the APA. We interpret the language of the Prayer requesting a finding of "null and void and of no force and effect" as equivalent to requesting a finding of "invalid and unenforceable" and nothing more.
8. The Vendorization Procedure Manual contains numerous regulatory provisions--too numerous to be listed here. Each of the regulatory provisions meets both prongs of the statutory definition of "regulation."

Brief mention will be made of several particular provisions as examples of the content of the Vendorization Procedure Manual.

First, the VPM contains numerous cross-references to the Rate Procedure Manual (RPM), which OAL found to be an underground regulation in 1986 Determination No. 9 (Department of Developmental Services, November 5, 1986, Docket No. 86-005), California Administrative Notice Register 86, No. 47-Z, November 21, 1986, pp. B-\_\_\_\_--B-\_\_\_\_. See, e.g., sections Intro - 100, 310B, 310E, 332, 364, 364.1, 369, Exhibit III-122, and Exhibit IX-1.

Second, the VPM contains numerous cross-references to the Regional Center Operations Manual (RCOM), a 650 page looseleaf publication dated December 1982. These cross-references impose additional requirements upon vendor applicants.

For example, VPM Exhibit III ("Camp-Day"), p. III-31 states in part:

"Instructions

Camps must be revendored ANNUALLY. However, the same vendor number may be maintained from year to year. Refer also to RCOM Sections 5820, 5822, 5824, and 5829." [Capitalization in original; emphasis added.]

Additional requirements imposed upon vendors seeking certification as "camps" are listed below under selected RCOM section numbers:

- o 5820
  - o counselor to client ratio must be maintained at 1:5.
- o 5822
  - o day camps must provide at least four hours of program per day.

Other cross-references to the RCOM are found in VPM sections 211, 220, 369.1, 369.3, 372.1, 372.3, Exhibit III-31, Exhibit III-122, Exhibit III-124, Exhibit III-125, and Exhibit VII-5.

Because the question is not properly before us, we express no opinion as to whether or not the remainder of the RCOM would pass muster under Government Code section 11347.5.

9. Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 389, 211 Cal.Rptr. 758, 760.
10. See Welfare and Institutions Code section 4620.
11. See note 9, supra.
12. The Department has previously cited Government Code section 11152 as its rulemaking authority for adopting regulations (see title 17, CAC, sections 50500-50650; 50651-50667). Other state agencies have cited section 11152 as rulemaking

authority: 1) State Lands Commission (title 2, CAC, sections 2125-2142), and 2) Office of Statewide Health Planning and Development (title 22, CAC, sections 91401-91405).

We also infer from Government Code section 11152.5 that the Legislature views section 11152 as a general grant of rule-making power.

13. "Developmental disability" is defined in section 4512(a) of the Welfare and Institutions Code as:

"a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism[ ], but shall not include other handicapping conditions that are solely physical in nature. . . ."

14. Government Code section 11342.2 provides that rulemaking power may also be impliedly granted by a statute. Section 11342.2 states:

"Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." [Emphasis added.]

See title 1, CAC, section 14(a)(2) (OAL's definition of implied authority.)

Thus, we conclude that DDS has not only been granted general and specific rulemaking power as noted in Part I, but also has been impliedly granted pertinent rulemaking power by the Lanterman Development Disabilities Services Act of 1978.

15. Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
16. See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
17. Department of Developmental Services, Vendorization Procedure Manual (undated), section 100.

18. Id.
19. Request for Determination, pp. 1-2.
20. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (points 1 and 2); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1, 2 and 3); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 144, 186 Cal.Rptr. 165, 175 (point 1); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
21. In part I of the text, we concluded that DDS has pertinent rulemaking power, both express and implied.
22. See Government Code section 11346, which provides:

"It is the purpose of this article [Article 5 of Chapter 3.5] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]
23. We recognize that the question of whether or not a challenged rule is a "regulation" is also pertinent to the question of whether or not the challenged rule is "quasi-legislative" in nature. Armistead v. State Personnel Board (1978) 22 Cal.3d 200, 202-204, 149 Cal.Rptr. 1, 2-3.
24. Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104, 111 (quasi-legislative acts are reviewable by ordinary mandamus (Code Civ. Pro., sec. 1085) or action for declaratory relief (Code Civ. Pro., sec. 1060); whereas, quasi-judicial or adjudicatory acts are reviewable by administrative mandamus (Code Civ. Pro., sec. 1094.5)); as cited in 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-34 and n. 14; typewritten version, p. 7 and n. 14.

25. See note 17, supra.
26. Welfare and Institutions Code sections 4500-4846.
27. Id., section 4416.
28. Id., section 4691(a).
29. The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
  - a. Rules relating only to the internal management of the state agency. Government Code section 11342(b).
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. Government Code section 11342(b).
  - c. Rules that "establish[ ] or fix[ ] rates, prices or tariffs." Government Code section 11343(a)(1).
  - d. Rules directed to a specifically named person or group of persons which do not apply generally throughout the state. Government Code section 11343(a)(3).
  - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. Government Code section 11342(b).
  - f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (quoted in full in note 22) (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 807, 321, 171 Cal.Rptr. 604, 612

("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions.

55/FN10-1-4